U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Issue date: 25Jul2002

In the Matter of:

PIERRE LAFOND
Employer

On Behalf of:

JOSE LUIS AVILA
Alien

Appearance: Abbe Allen Kingston, Esq.
for the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before:
Holmes, Vittone and Wood Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

This case arose from an application on for labor certification on behalf of alien, Jose Luis Av a ("Alien") filed by Employer, Pierre Lafond ("Employer") pursuant to 212(a) (5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a) (5) (A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756 The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a) (5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working

conditions through the public employment service and by other means in order to make, a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On November 17, 1998, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Cook in its café, gourmet deli, clothing shops, winery.

The duties of the job offered were described as follows:

"Prepare, season & cock a variety of entrees and side dishes for lunch and dinner (i.e.,meat, chicken, salads, enchiladas, lasagna, quiche, etc.) according to menu. Wash & prepare vegetables and fruits. Estimate food requirements & order food."

Two years experience in the job was required. was required. Wages were $12.76 per hour. No overtime hours, but the hourly rate 1.5 times the regular rate. The applicant supervises 0 employees
and reports to the General Manager. (AF—l6-42)

On May 23, 2001, the CC issued a NO denying certification. The CO citing Section 656.21(b) (6) and/or 6!6.21(j) (1) (iii) and (iv) found that U.S. workers were rejected for other than lawful reasons. Specifically: "Mark D. Webb must be given the consideration of the Cook position, if qualified. He cannot be disqualified because he is working on his business goal of owning a catering or restaurant business." As corrective action ". .the employer must explain with specificity, the lawful job-related reasons for rejecting each U.S. worker referred, and give the job title of the person who considered them for employment." (AF-12-l4)

On June 7, 2001, Employer forwarded its rebuttal through counsel, which, also, contained a letter dated June 5, 2001, in which the general manager of Employer stated that Mr. Webb was found not qualified for the position of cook for the reasons: "1. Mr. Webb was operating his own business as a food caterer and was attempting to open his own restaurant. Both his catering business and proposed restaurant create a conflict with our own need and business activity. 2. I would not have felt comfortable giving Mr. Webb access to our recipes, food processing procedures and customer list. We are very proud of our distinctive food service. Mr. Webb is operating a competing business as a caterer and potential restaurant owner. I cannot be expected to give access to confidential information about cur business practices. 3. Mr. Webb made it clear that he was going to continue his catering and future preparations for his business plans if hired by Pierre Lafond & Co. 4. The business interests of Pierre Lafond & Co would be compromised if Mr. Webb was hired as a cook and given access to our business concepts, practices and recipes." (AF -5-11)

On June 28, 2001 the CC issued a Final Determination denying certification, stating: "The employer's rebuttal stated that the U.S. applicant Mark D. Webb cannot be considered for the Cook position. The reason was Mark D. Webb's primary focus is his catering business and he will be requesting 'time off' when his personal business activities require his attention. The employer feels there is competition and his recipes, production methods, and customer lists will be taken by Mark Webb. When a U.S. applicant is qualified for a job he should be offered the position. Mark Webb could have pre-planned his catering business events and not come in conflict with the Cook position. Basically, the employer should have offered the position to Mark Webb and it is not shown how Mr. Webb was not qualified, able, willing or available to fill the job vacancy." (AF-3-4)

On July 18, 2001, the Employer filed a request for review of denial of labor certification. (AF-l,2)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); BeILha CorD., l988-INA-24 (1989) (en banc). The employer has the burden of persuasion on the issue of lawful reject~ion of U.S. workers. Cathay Carpet Mill, Inc., 1987-INA-161 (Dec. 7, 1988) (en banc) Although written assertions constitute documentation that must be considered under Gencorp, 1987-INA-659 (January 13. 1988) (en banc), bare assertions without supporting evidence are generally insufficient to carry an employer's burden of proof. (Sang Chun~ Insurance Agency, 2000-INA-259 (January 11, 2001) On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 1988-INA-32 (April 5, 1989)

At the outset, it appears that Mr. Webb is qualified for the job advertized. That said, Employer has made a prima facie case that Mr. Webb was not fully available and/or willing to carry out the duties of the job. Mr. Webb's resume demonstrates a long history in the sales, consulting and management end of the food/restaurant business, thus indicating that his interest in continuing his consulting business and opening a restaurant business as alleged by Employer is probably a serious venture and proposal. On October 20, 1998, Mary Weeks, long time General Manager for Employer stated that she had contacted Mr. Webb and discussed his business goals. Mr. Webb, according to Ms. Weeks, would be continuing to build his own catering/restaurant business while working for Employer if hired. Ms. Weeks expressed concern over Mr. Webb's seeming conflict of interest and the compromise it would cause Employer if he were hired. She concluded with respect to the hiring process: "There were three applicants and none were both qualified and available."

With respect to Mr. Webb's application, we believe the CC has been unduly concentrating on Employer's suggestions that Mr. Webb is "unqualified" and that a "conflict in interest" would

ensue if he was hired. Indeed, Employer emphasized these aspects in its rebuttal. Prior panel decisions of this Board have not been sympathetic to employers' assertions that a U.S. applicant may be a potential competitor and speculation that such an applicant would not devote himself/herself to the employer's ful-l time job. *See e.g., Fashions From India, Inc*., 1992-INA-26 (Feb. 4, 1993); *Royal Peddler*, 1987-INA-679 (Feb. 5, 1988) *Roger Bowman Upholstering*, 1991-INA-163 (May 18, 1992). Nor has speculation that an applicant would not be likely to become a long-term employee been found to be a lawful ground for rejection of a U.S. applicant. *See e.g, Chuang, Chen Fan & Pai Accountancy Corp*., 1992-INA-209 (June 1, 1993); *Roy Rogers Restaurant*, 1992-INA-288 (July 1, 1993). Nevertheless, Employer has made a credible and apparently bona fide assertion that Mr. Webb would be unavailable in its business due to his own catering business. No additional documentation was required by the CC of Employer to support its assertion that Mr. Webb would not always be available as a cook on the strict, demanding schedule of Employer. Rather the CO merely asserts that ". .Mr. Webb could have pre-planned his catering business events and not come in conflict with the Cook position." There is no basis on which the CO makes this assertion, nor is there clear indication that the job was not offered to Mr. Webb. To the contrary in her letter of June 5, 2001 and earlier was discussed at some lengths and that Mr. Webb indicated he would accept the job only on his own terms which could and probably would mean not showing up for work if it conflicted with his own catering schedule do not take all of employer's arguments entirely at face value. Nevertheless, relentless pursuit of an applicant is not required under labor certification, and an employer who might additionally be put to some proprietary risk may be excused from not being overly aggressive.

We believe the Employer has rebutted the CO's NOF and that a basis for denial has not been sustained.

Order

The Certifying Officer's denial of labor certification is REVERSED and the matter remanded for granting of certification.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review

must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.